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Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1973

No. 73-95

JOSEPH SATKIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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In The

Supreme Court of the United States

October Term, 1972

No.

JOSEPH SATKIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States

Your petitioner, Joseph Satkin, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on June 12, 1973 which judgment affirmed a judgment of sentence of the United States District Court for the District of New Jersey filed November 21, 1972.

Citation to Opinions Below

Petitioner's sentence was affirmed by an unreported judgment order of the Court of Appeals which is printed in Appendix B, infra.

Jurisdiction

The judgment of the Court of Appeals was entered on June 12, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Did not petitioner's sentencing violate established standards of due process where it was based upon a false, inaccurate and misleading pre-sentence report?

2. Did not petitioner's sentencing violate the modern penological philosophy of individualization by treating him in a manner identical with other sentenced contemporaneously for similar crime?

3. Do not federal appellate courts have the power to review sentences for excessiveness even though they are within statutory limits and was not petitioner's sentence herein excessive?

Constitutional Provision Involved

The constitutional provision involved is the due process clause of the Fifth Amendment which is printed in Appendix A, infra.

Statement

Petitioner was charged in a 40 count indictment with submitting false documents to the Federal Housing Administration in matters involving 12 properties in the City of Passaic, New Jersey, in violation of 18 U.S.C. Section 1010.

Petitioner pleaded guilty to Counts 1, 4, 11, 17 and 20 (95a).* There were two sentencing hearings, November 10 and 17, 1972, to which reference will be made.

At the outset of the sentencing proceedings on November 10, 1972 counsel requested an opportunity to review the defendant's pre-sentence investigation (4a-5a). This request was based upon the severe sentence meted out to five men, involved in FHA frauds, some two weeks earlier by the same judge,[1] and the fact that "common gossip" appeared to lump this defendant in with the others (5a). The court initially denied the request.

Counsel then launched into numerous matters in mitigation, attempting to convince the court that petitioner should not be treated as were the five men sentenced two weeks before. Counsel quoted from newspaper reports of that earlier proceeding (which the judge did not dispute) wherein the court had said that these crimes shocked its conscience in that they constituted a scheme to derive huge profits by selling slums to low income families (3a). In order to convince the court that peti-

* "a" references are to the appendix to petitioner's brief before the Court of Appeals.

1. Petitioner had originally been scheduled for sentencing the same day as these other men but his matter had been adjourned due to the unavailability of his attorney on that date (2a).

tioner's crimes were not of that nature, counsel brought out the following:

(1) That petitioner had never been in any previous trouble with the law (8a).

(2) That petitioner had, after pleading guilty, been prepared to be a government witness at the trial of one of the men sentenced two weeks before (the only government official in the group) (8a-10a).

(3) A series of letters from responsible and highly reputable people in the City of Passaic, attesting to petitioner's good character and good deeds (10a-13a).

(4) A series of newspaper articles attesting to the fact that responsible people, including the Building Inspector of Passaic and the President of the Passaic County Tax Board, did not consider petitioner a "slumlord" but, on the contrary, felt that he had been good for the City of Passaic, converting condemned buildings into habitable and fit residences (13a-15a). In this connection, counsel had brought to court various building inspectors to verify the fact that most of the twelve properties covered by this indictment were condemned before petitioner took them over.

(5) Petitioner's serious medical condition was also explored at length, with hospital records and doctor's reports placed before the court (16a-21a).

(6) Counsel then offered various documents to the court designed to show that petitioner had merely purchased buildings, repaired them, and sold them, making no more than a fair profit for his extensive labors. The result was that the present values of the buildings, determined by an independent appraiser, were nearly the same as when petitioner sold them and that the FHA mortgages placed upon the buildings were still in existence, with only one exception (21a-24a).

These facts were pointed to as evidence that petitioner cheated neither the government nor the people who bought the houses. This was not a situation where the FHA official was bribed to place an exorbitant appraisal on a house so that the seller would reap a windfall profit (24a). Counsel pointed out that petitioner made a net profit of $47,780.95 on the twelve buildings involved in this indictment, over a period of some two years and after extensive effort on his part (25a-26a).

(7) Petitioner's co-counsel also addressed the court, pointing out that petitioner had purchased and rehabilitated 91 buildings in Passaic in addition to the twelve involved in this case. The result was decent housing for 572 families, in addition to the 25 families who lived in the houses involved in this case (28a-29a). Petitioner had helped to "stem the tide of decay in Passaic," had improved conditions in the city and cooperated fully with city officials at all times (29a). Co-counsel, a former Mayor of Passaic and member of the governing body for 20 years, described

petitioner as a "force for good" in the city and well liked by his tenants (30a-31a). In conclusion, he was not a "slumlord".

At the conclusion of this lengthy hearing the court ruled that counsel would be permitted to review the pre-sentence report (32a) and adjourned the sentencing for one week.

On the adjourned date counsel addressed himself to the contents of the pre-sentence report, noting that it referred to petitioner as a co-defendant with the other five men who had been sentenced some weeks earlier. While all had been involved in what might generally be called FHA frauds they were not, in fact, co-defendants of petitioner (39a). The report also stated that the prices of the houses in question were inflated by fraudulent appraisals, and that petitioner was a "slumlord", statements which counsel characterized as untrue (40a). The report also said that petitioner had a reputation in Passaic of trying to cheat the banks that he dealt with (40a). As counsel pointed out, this statement was difficult to square with the letter from bank Vice President Clark submitted the week before (11a) wherein he spoke highly of petitioner's dealings with the banks (40a-41a). The report also contained a statement that petitioner exploited colored people in the City of Passaic, a comment that counsel contrasted with those colored people present at the sentencing to attest to petitioner's good works with the colored population of Passaic (41a).

Counsel then pointed out that the pre-sentence investigation contained an insert, apparently duplicated, dealing with the "details of the offense." That insert stated that the people involved in these offenses would buy a building for a low price, make only "cosmetic repairs" and then sell the building for an exorbitant profit (43a-44a). As counsel pointed out, this insert lumped petitioner with the other men who had been involved in these FHA cases just as did the references in the report to all of them as co-defendants.[2] Furthermore, the details were just plainly untrue as to petitioner who, it was demonstrated, had taken condemned buildings, made them habitable by extensive and costly repairs and obtained approval for occupancy from the City (44a).

Counsel then adverted to a supplemental pre-sentence investigation which had mysteriously appeared during the week between the two sentencing hearings. It was never explained why there had been any necessity for a supplemental report or who had called for such a report. The inference remains strong that the report was intended to counter some of the arguments and proof offered by counsel on November 10. As counsel described it, the supplemental report contained not one good thing about petitioner (45a) and was, in his words, ninety-five percent "false, inaccurate and misleading" (50a). As an example of false statements, counsel referred to information in the report that on three particular buildings petitioner made

2. Counsel suggested that the pre-sentence reports of the other men would undoubtedly contain the same insert dealing with "details of the offense" (43a-44a). It was for that reason that petitioner moved before the Court of Appeals to have the pre-sentence reports of these men made a part of the record in this case. That application was never ruled upon.

no repairs, and that various purchasers were victimized by petitioner (47a-48a). As an example of misleading information were statements that petitioner made a gross profit of $175,000 on these 12 houses (38a-39a) and that the properties were bought and sold on the same day (36a).

Co-counsel then proceeded to go in detail through the transactions involving the three properties which had been singled out for adverse comment in the supplemental report, showing that on each, petitioner made only a modest profit for his completely genuine labors in rehabilitating these houses (52a-57a). In each instance he purchased the properties under contract months before the sale and spent time, money and effort to render them habitable. In suggesting that petitioner made huge, unconscionable profits in same-day purchases and sales the report was so misleading as to be false (58a). Photographs showing the condition of some of these properties before and after petitioner acquired them were also placed in evidence (60a-61a). Counsel also explained the circumstances behind the one property where the FHA mortgage had gone into default (62a-63a). Counsel offered more letters attesting to petitioner's good character (61a-65a) and proferred witnesses in court to the same effect (67a). Witnesses from the City Building Department were also brought to court to verify the substantial money which petitioner invested in rehabilitating these run-down properties (69a-70a).

At the conclusion of this hearing the court declined to have any of the proferred witnesses testify, stating that he accepted the representations made by counsel (73a-74a). Petitioner was thereupon sentenced to four years in prison and a $25,000 fine.

Reasons for Granting the Writ

1. In Townsend v. Burke, 334 U.S. 736, 68 S. Ct. 1252, 92 L. Ed. 1690 (1948), this Court made it clear that a sentence based upon false, inaccurate or misleading information violates due process of law and cannot be permitted to stand. As the Court put it in United States v. Malcolm, 432 F.2d 626, (9th Cir. 1971), the question is whether the sentencing process "was infected with fundamental defects resulting in a miscarriage of justice, and whether it was consistent with rudimentary demands of fair procedure." Those standards were clearly violated in this case. Petitioner made a more than sufficient showing that his pre-sentence report (and its supplement) were filled with highly unreliable and, indeed, false information.[3] The trial judge at no time stated that he was disregarding the challenged information and, therefore, it must be presumed that he did, in fact, rely upon it in sentencing petitioner. The report sought to paint petitioner as a "slumlord", reaping exorbitant profits at the expense of poor, colored families in the City

3. This case points up the salutory effect which disclosure of pre-sentence reports can and will have on the administration of criminal justice. It is unthinkable that petitioner should have been sentenced without even knowing what was in this report.

of Passaic. As counsel demonstrated, this was just not so. Petitioner bought run-down or condemned properties, invested time, effort and money in their rehabilitation, made them habitable for families who had no other housing and then sold them at a modest profit. Neither the purchasers nor the government was "victimized." Indeed, the only true victim of the false "gift letters"[4] was petitioner himself since, as seller, he would have been entitled to the down payment which was never actually received. In all these respects, the pre-sentence report and its mysterious "supplement" were so riddled with unreliable information as to call for their total disregard in the sentencing process.[5] As the court said of pre-sentence reports in State v. Kunz, 55 N.J. 128, 259 A.2d, 895, 897 (Sup. Ct. 1969):

> "Their worth, so long as they are accurate, is beyond question; if inaccurate, their harm may be incalculable."

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4. The gift letter was a letter from someone, often a relative, attesting to the fact that they had given the prospective purchaser a gift in the amount required for the down payment. This was necessitated in many instances where low income families did not have the funds for the down payment and due to the fact that secondary financing was prohibited by FHA regulations then in effect.

5. Nor is it clear why the reports contained no information favorable to petitioner. This was especially true of the supplemental report. One may well question, as counsel did (45a-46a) why the supplemental report contained no verification of counsel's statement, made the week before, that petitioner had cooperated with the government and was prepared to be a government witness against Bednarz, the FHA official who finally pleaded guilty. Though the government had agreed to advise the court of this cooperation (9a) it apparently did not find its way into either report.

Petitioner's sentencing based upon these reports was a travesty of due process. The Court of Appeals held that the access to the reports and the opportunity for a hearing somehow cured this fundamental defect. That answer entirely misses the point, however, since, as noted above, there is no way of knowing on this record whether the sentencing judge did or did not rely upon the false, inaccurate and misleading information placed before him. This Court should grant review herein in order to correct this manifest injustice and to further explicate the due process standards laid down over 25 years ago in Townsend v. Burke, supra. The entire area of federal sentencing review requires action by this Court.

2. Petitioner's sentence also contravened the modern penological philosophy of individualizing sentences espoused by this Court in Williams v. New York, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949). The Court there praised the concept that the "punishment should fit the offender and not merely the crime."

> "The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." 337 U.S. at 247, 69 S. Ct. at 1083.

The trial judge herein failed to individualize petitioner's sentence by "lumping" him in with the other men who had been sentenced several weeks earlier in cases involving similar FHA frauds. The pre-sentence report bears out this

contention. As noted previously, it refers t all of these men as co-defendants when they wer not. Furthermore, it contains a reproduce insert purporting to give the "details of the of fense" in plural terms which clearly indicate tha the same statement was meant to apply to all o these other men. This contention would be furthe established if the pre-sentence reports of thes other five men were considered in order to de termine if the same insert was in fact in all o the reports. The sentence proceedings of thes men would also be highly relevant to this contention It would show that those men whose positions wer similar to this defendant received prison term identical with his.[6]

What appears here is not an individualize sentence which considered petitioner on his ow merits but rather a sentence "based solely on th crime with which the defendant is charged." Suc a sentence is not an exercise of discretion. Unite States v. McCoy, 429 F.2d 739, 743 (D.C. Cir 1970); United States v. Daniels, 446 F.2d 967 (6t Cir. 1971).

In order to re-emphasize the necessity for in dividualizing sentences, (not even mentioned by th Court of Appeals although raised below), as calle for in Williams v. New York, supra, certiorar should be granted in this case.

6. Petitioner moved before the Court of Appeals to have the sentencing proceedings and the pre-sentence reports of t other men made a part of this record. That applicati was not even ruled upon by the Court of Appeals.

Reasons for Granting the Writ

3. Petitioner urged below that his sentence, though within statutory limits, was excessive in view of the nature of the offense and the matters presented at the sentencing hearing. Once again, the Court of Appeals did not touch on this contention, perhaps feeling bound by numerous past decisions denying the power to review sentences for excessiveness. See, e.g. United States v. Williams, 254 F.2d 253, 255 (3rd Cir. 1957); United States v. Hasbrouck, 449 F.2d 1303 (3rd Cir. 1971). Petitioner acknowledges that this constitutes the prevailing view. Nevertheless, while they constitute a distinct minority, federal courts both past, United States v. Wiley, 278 F.2d 500 (7th Cir. 1960), and present, United States v. McKinney, 427 F.2d 449 (6th Cir. 1970), have undertaken to revise sentences which they considered "excessive and out of proportion to the offense", id. at 455. In Smith v. United States, 273 F.2d 462, 467 (10th Cir. 1959), Chief Judge Murrah, dissenting, found the power to review excessive sentences in 28 U.S.C.A. Section 2106. But see United States v. Rosenberg, 195 F.2d 583, 604-607 (2d Cir. 1952), cert. denied, 344 U.S. 838 (1952). There can be no doubt that recent trends are in favor of appellate review of sentences. See State v. Kunz, supra, 259 A.2d at 901-902; Note, 14 Ariz. L. Rev. 477 (1971); ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences, (App. Draft 1968); Burr, Appellate Review as a Means of Controlling Criminal Sentencing Discretion - A Workable Alternative, 33 U. of Pitt. L. Rev. 1 (1971); Sobeloff, A Recommendation for Appellate Review of Criminal Sentences, 21 Brooklyn L. Rev. 2 (1955).

This would be an appropriate case in which to re-examine this entire controversy concerning appellate review of sentences in the federal courts. Laws were violated and defendant admitted his guilt but, based upon all of the matters entered in these proceedings, the sentence of four years here imposed can only be described as harsh, "excessive and out of proportion to the offense", United States v. McKinney, supra. Federal appellate courts have differed on this question which is of major importance in the administration of criminal justice. Certiorari should be granted to set these matters at rest.

Respectfully submitted,

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Appendix A

Constitutional Provision Involved

United States Constitution, Amendment V:

". . . nor shall [any person] be deprived of life, liberty, or property, without due process of law . . . ."

Appendix B

Judgment Order of the Court of Appeals

(Filed June 12, 1973)

UNITED STATES COURT OF APPEALS
For The Third Circuit

No. 72-2156

UNITED STATES OF AMERICA

v.

JOSEPH SATKIN, Appellant

(D.C. Crim. No. 682-71)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Judgment

Submitted Under Third Circuit Rule 12(6) June 11, 1973
Before GIBBONS, ROSENN and WEIS,
Circuit Judges

Appellant was sentenced after a guilty plea. Although the sentence is within statutory limits he contends that it was tainted by inaccuracies in a presentence investigation report. He was afforded access to the report and a full opportunity in a hearing to refute the disputed matters in the report,

It is ORDERED and ADJUDGED that the judgment of the district court is affirmed.

By the Court,

s/ John J. Gibbons
Circuit Judge

Attest:

s/ Thomas F. Quinn
Thomas F. Quinn
Clerk

Dated: June 12, 1973